U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)

Issue Date: 17 January 2006

CASE NO.: 2004-BLA-6688

In the Matter of

WILLIAM A. VENESKY,
Claimant

v.

PENN ALLEGHEY COAL CO, INC.
Employer

and

INTERNATIONAL BUSINESS AND
MERCANTILE REASSURANCE COMPANY,
Carrier

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Cheryl Catherine Cowen, Esq.,
For the Claimant

George H. Thompson, Esq.,
For the Employer

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS[1]

[1] Sections 718.2 and 725.2(c) address the applicability of the new regulations to pending claims.

This proceeding arises from a miner's subsequent claim for benefits, under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq*., as amended ("Act"), filed on April 14, 2003. The Act and implementing regulations, 20 C.F.R. parts 410, 718, and 727 (Regulations), provide compensation and other benefits to:

1. Living coal miners who are totally disabled due to pneumoconiosis and their dependents;
2. Surviving dependents of coal miners whose death was due to pneumoconiosis; and,
3. Surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death.

The Act and Regulations define pneumoconiosis as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

PROCEDURAL HISTORY

This is the Claimant's third claim for benefits under the Act. The claimant filed his first prior claim for benefits on November 10, 1992 (Director's Exhibit ("DX") 1). The claim was denied because the evidence failed to establish that the Claimant was totally disabled due to pneumoconiosis. (DX 1). On September 14, 1995, Administrative Law Judge Gerald M. Tierney issued a Decision and Order denying benefits.[2]

The Claimant filed his second claim for benefits on September 26, 1996 (DX 2). The District Director denied the claim on February 10, 1997, ruling that the Claimant had failed to establish total disability due to pneumoconiosis (DX 2). The District Director also noted that there had been no material change in the Claimant's condition since the denial of the first claim. The record does not indicate any request for a hearing on this claim before an Administrative Law Judge.

The Claimant filed the current claim on April 14, 2003 (DX 4). The claim was denied by the District Director because the evidence failed to establish that the claimant was totally disabled due to pneumoconiosis (DX 33).[3] On June 1, 2004, the claimant requested a hearing before an administrative law judge (DX 35). On August 17, 2004, the case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Program (OWCP) for a formal hearing (DX 37). The case was originally assigned to be heard by Administrative Law Judge Gerald M. Tierney. On April 14, 2005, the case was reassigned to me.

[2] Specifically, Judge Tierney found that the Claimant had established the presence of pneumoconiosis and that the disease arose out of coal mine employment; however, the Claimant did not establish total disability or, accordingly, the causal link between disability and pneumoconiosis.

[3] Because failure to establish this element of entitlement was the basis for the denial of the second claim, the District Director accordingly noted that there was no material change in the claimant's condition. (DX 33).

On June 21, 2005, I held a hearing in Pittsburgh, Pennsylvania, at which the claimant and employer were represented by counsel.[4] No appearance was entered for the Director, OWCP. The parties were afforded the full opportunity to present evidence and argument. Claimant's exhibits ("CX") 1-3, Director's exhibits ("DX") 1-39[5], and Employer's exhibits ("EX") 1-5[6] and 7-12 were admitted into the record at the hearing.[7]

I have admitted post hearing the medical report template of Dr. Gregory J. Fino as CX 5, the deposition of Dr. Robert A.C. Cohen as CX 6, an X-ray reading report of Dr. Enrico Cappiello as CX 7, and the certificate evidencing the B-readership of Dr. Charles Lynn as CX 8.[8] Additionally, I have admitted post-hearing the medical report of Dr. Robert G. Pickerill as EX 13,[9] the X-ray reading report of Dr. Thomas M. Hayes as EX 14, and the deposition of Dr. Gregory J. Fino as EX 15.

ISSUES

I. Whether the miner has pneumoconiosis as defined by the Act and the Regulations?

II. Whether the miner's pneumoconiosis arose out of his coal mine employment?

III. Whether the miner is totally disabled?

IV. Whether the miner's disability is due to pneumoconiosis?

V. Whether there has been a change in an applicable element of entitlement upon which the order denying the prior claim became final? (Post-Jan. 19, 2001)

FINDINGS OF FACT

I. Background

A. Coal Miner

[4] Under *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1998)(*en banc*), the location of a miner's last coal mine employment, i.e., here the state in which the hearing was held, is determinative of the circuit court's jurisdiction. Accordingly, this case follows Third Circuit jurisdiction.

[5] At the hearing, I determined that the last two sentences of the body of DX 14 would be redacted. For a discussion of this ruling, see, *infra* Part XX.

[6] EX 1 includes Dr. Gregory J. Fino's interpretation of a June 22, 1993 X-ray. I deemed this interpretation inadmissible at the hearing; however, for the reasons set forth *infra* Part XX, it is now admissible. This interpretation is hereby identified as EX 1D.

[7] Employer withdrew the exhibit it had previously submitted as EX 6.

[8] Claimant also submitted as CX 4 a document in support of its position that Dr. Fino's October 18, 2004 X-ray is inadmissible because it was taken digitally. Because that X-ray is inadmissible on other grounds, CX 4 is irrelevant to this decision and therefore not admitted. *See* 29 C.F.R. § 18.401-402.

[9] In its closing brief, Employer represented that this exhibit shall be identified as EX 3. However, because another exhibit has already been admitted as EX 3, this exhibit is hereby identified as EX 13. Additionally, this exhibit includes the X-ray interpretation of Dr. Jonathan I. Abrahams, which is hereby identified as EX 13A.

The Claimant was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations, for 13 years (DX 1). [10]

B. Date of Filing

The Claimant filed his claim for benefits, under the Act, on April 14, 2003 (DX 4). None of the Act's filing time limitations are applicable; thus, the claim was timely filed.

C. Responsible Operator

Penn Allegheny Coal Co, Inc. is the last employer for whom the Claimant worked a cumulative period of at least one year and is the properly designated coal mine operator in this case, under Subpart G, Part 725 of the Regulations (DX 6).[11]

D. Dependents[12]

The Claimant has dependent for purposes of augmentation of benefits under the Act, his wife Brenda. (DX 4; Transcript ("TR") 9).

E. Personal, Employment, and Smoking History[13]

The Claimant was born on May 4, 1945 (DX 4). He married Brenda Miller on June 19, 1965 (DX 11). The Claimant's last position in the coal mines was that of a mechanic (TR 11). His last date working in coal mine employment was September 12, 1990 (DX 4).

He was employed in underground mines for 13 years (DX 4). As part of his duties, the Claimant was required to repair equipment and work at the face mining coal (TR 11).

There is evidence of record that the Claimant's respiratory disability is due, in part, to his smoking history. The evidence is conflicting concerning his exact smoking history. Reports vary from a half pack per day for approximately thirty years to two packs per day for forty years. However, I find he smoked approximately one pack per day for approximately thirty years.

This conclusion reflects both the evidence offered under oath and the overall weight of the evidence. In resolving this conflict, the testimony of the claimant is most relevant. Unlike the doctors, the claimant has direct first-hand knowledge of his own smoking history; additionally, such testimony is under oath. The claimant testified as to his cigarette intake level

[10] These matters were finally resolved a the hearing before Administrative Law Judge Tierney by way of Employer's stipulation. Thus, the parties are estopped from relitigating it at this late juncture. *In the Matter of Felix H. Coleman v. Harmon Mining Corp. and Director, OWCP*, 21 B.L.R. 3-1 (1996) *citing Untied States v. Utah Construction & Mining Co.*, 384 U.S. 394 at 422 (1966) and *Detroit Police Officers' Association v. Young*, 824 F.2d 512 (6th Cir. 1987).

[11] Employer has not contested its status as Responsible Operator (DX 37).

[12] See 20 C.F.R. §§ 725.204-725.211.

[13] "The Act, judicial precedent, the Regulations do not permit an award based solely upon smoking-induced disability." 65 Fed. Reg. 79948, No. 245 (Dec. 20, 2000).

and when he quit smoking at the June 21 hearing, stating that he smoked one pack of cigarettes per day and quit smoking in 1991 (TR 20, 12-13).

The record is replete with medical reports, treatment records, and hospital records.[14] The vast majority of them report a smoking history of approximately thirty years with an intake level of one pack per day. A small minority of hospital records report a history of two packs per day for forty years. At the hearing, the Claimant testified that such records constitute a misunderstanding (TR 21). Given the weight of the records supporting the Claimant's position of a lesser intake level, I credit his testimony and find his intake level to be one pack per day. Moreover, given the weight of the evidence, I find the Claimant's smoking duration to be thirty years.

II. Medical Evidence[15]

I incorporate by reference the summary of evidence contained in Judge Tierney's Decision and Order Denying Benefits in the first claim (DX 1) and the District Director's decision denying benefits in the second claim (DX 2). The following is a summary of the evidence submitted since the final denial of the prior claim.

A. Chest X-rays[16]

There are eight admitted X-ray readings. All of the readings are properly classified for pneumoconiosis, pursuant to 20 C.F.R. § 718.102(b).[17] Six are positive[18] by Drs. Lynn, Cohen, Cappiello, Amhed, Fino, and Abrahams, all of whom are either B-readers, Board-certified in radiology, or both.[19] Two are negative, both by Dr. Hayes, who is a B-reader and Board-certified in radiology.

The admissibility of the X-ray evidence in this case merits some discussion. The Claimant has submitted three X-ray readings:

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[14] *See e.g.* DX 15, CX 1, EX 1, EX 5, EX 10, EX 11, and EX 13.

[15] *Dempsey v. Sewell Coal Co. & Director, OWCP,* 23 B.L.R. 1-47 (2004). (BRB upheld regulatory limitations on the admissibility of medical evidence, under the new 2001 regulations, i.e., 20 C.F.R. Sections 725.414 and 725.456(b)(1)).

[16] In the absence of evidence to the contrary, compliance with the requirements of Appendix A shall be presumed. 20 C.F.R. § 718.102(e)(effective Jan. 19, 2001).

[17] ILO-UICC/Cincinnati Classification of Pneumoconiosis – The most widely used system for the classification and interpretation of X-rays for the disease pneumoconiosis. This classification scheme was originally devised by the International Labor Organization (ILO) in 1958 and refined by the International Union Against Cancer (UICQ) in 1964. The scheme identifies six categories of pneumoconiosis based on type, profusion, and extent of opacities in the lungs.

[18] The minimum interpretation that qualifies as positive for the presence of pneumoconiosis under 20 C.F.R. § 718.102(b) is 1/0.

[19] *LaBelle Processing Co. v. Swarrow,* 72 F.3d 308, 310 n.3 (3rd Cir. 1995). ("A "B-reader" is a physician, often a radiologist, who has demonstrated proficiency in reading X-rays for pneumoconiosis by passing annually an examination established by the National Institute of Safety and Health and administered by the U.S. Department of Health and Human Services. *See* 20 C.F.R. § 718.202(a)(1)(ii)(E); 42 C.F.R. § 37.51. Courts generally give greater weight to X-ray readings performed by "B-readers." *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 108 S.Ct. 427, 433 n.16, 98 L.Ed. 2d 450 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993).").

(1) CX 1, Dr. Cohen's July 15, 2004 reading of his own X-ray;
(2) CX 2, Dr. Cappiello's September 29, 2004 reading of Dr. Lynn's X-ray; and
(3) CX 3, Dr. Amhed's September 30, 2004 reading of Dr. Lynn's X-ray.

A claimant is entitled to submit two chest X-ray interpretations in support of his affirmative case. 20 C.F.R. § 725.414(a)(2)(i). A claimant is also entitled to submit one interpretation of, *inter alia*, a chest X-ray submitted by the Director. 20 C.F.R. § 725.414(a)(2)(ii). In this case, CX 1 constitutes one of the Claimant's allotted readings for his affirmative case. CX 2 and CX 3 are both readings of Dr. Lynn's X-ray, which was submitted by the Director. While this exceeds the number of interpretations of the Director's X-ray allowed by the Regulations, the Claimant has not submitted another reading as part of his affirmative case. Therefore, I am admitting both CX 2 and CX 3: CX 2 an interpretation of the Director's X-ray and CX 3 as the Claimant's second affirmative reading.

The Employer submitted the following X-ray readings:

(1) EX 1A, Dr. Fino's December 17, 2004 reading of an X-ray dated October 18, 2004;[20]
(2) EX 1B, Dr. Fino's December 17, 2004 reading of an X-ray dated June 8, 1991;
(3) EX 1C, Dr. Fino's December 17, 2004 reading of an X-ray dated December 7, 1992;
(4) EX 1D, Dr. Fino's December 17, 2004 reading of an X-ray dated June 22, 1993;
(5) EX 7, Dr. Hayes's reading of Dr. Lynn's X-ray;
(6) EX 8, Dr. Hayes's August 3, 2004 reading of an X-ray dated October 13, 2003;
(7) EX 13A, Dr. Pickerill's reading of an X-ray dated July 12, 2005;[21]
(8) EX 13B, Dr. Abraham's July 12, 2005 reading of an X-ray dated May 31, 2005;
(9) EX 13C, Dr. Huang's May 31, 2005 interpretation of an X-ray dated May 31, 2005; and,
(10) EX 14, Dr. Hayes's June 21, 2005 interpretation of Dr. Cohen's X-ray.

Six of the X-ray readings submitted by the Employer are excluded. EX 1A is excluded because the Employer failed to comply with an Order dated October 26, 2005. That Order required that, should the Employer wish to offer this reading as evidence, it must deliver prints of the X-ray in film form to Claimant's counsel by October 28, 2005. By correspondence to this Court received on October 28, 2005, Employer's counsel represented that he would hold the films in his possession rather than deliver them to

[20] Employer did not delineate EX 1A, 1B, 1C, and 1D as such. Rather, all four X-ray readings were submitted as part of EX 1. However, for ease of discussion in both this section and throughout this Decision, I will refer to each reading with both the number and letter.
[21] This interpretation was referenced in EX 13, Dr. Pickerill's report. Employer submitted three X-ray readings with EX 13. For the same reasons as explained *supra*, note 19, I will refer to the three X-rays readings contained in EX 13 by both number and letter.

Claimant's counsel. In her closing brief, Claimant's counsel also represented that Employer's counsel had not delivered the films to her as directed by the Order. Therefore, I find that the Employer has not complied with the Order and, consequently, EX 1A is excluded.

EX 1B and 1C are excluded pursuant to my ruling at the hearing. At the hearing, Claimant objected to the admission of these X-ray readings because they exceeded the evidence limitations of 20 C.F.R. § 725.414.[22] Employer, through counsel, indicated that it did not contest this objection. Therefore, I find these readings to exceed the evidence limitations put forth by the Regulations and, consequently, EX 1B and 1C are excluded.

EX 8, EX 13A, and EX 13C are also excluded because they exceed the evidence limitations of 20 C.F.R. § 725.414.

EX 1D and EX 13B are admitted as the Employer's two X-ray readings allowed for its affirmative case. 20 C.F.R. § 725.414(a)(3)(i). EX 1D had been excluded at the hearing for the same reasons as EX 1B and 1C. However, because EX 1A was subsequently excluded, the Employer is entitled to an additional X-ray reading for its affirmative case. Any one of the readings excluded for violation of the evidence limitations may now be admitted as part of the affirmative case. I find that EX 1D would be most supportive of the Employer's case and therefore admit that X-ray as part of its affirmative evidence.[23]

EX 7 and EX 14 are both admitted pursuant to 20 C.F.R. § 725.414 (a)(3)(ii).

The admitted X-ray evidence is summarized in the table below:

Exhibit Number	**Dates: X-ray/ Reading**	**Reading Physician**	**Qualifications**[24]	**Film Quality**	**ILO Classification**	**Interpretation or Impression**
DX 18	5/16/03 5/19/03	Lynn	B-reader Board certified	1	2/2	t/s
CX 1	6/29/04 7/1/04	Cohen	B-reader	1	1/1	q/s

[22] Claimant also objected to the X-ray reading I have identified as EX 1D. This reading is susceptible to the same objection as EX 1B and 1C; however, for the reasons stated *infra*, that reading is admitted.

[23] EX 1D produced a 1/0 impression. This is a more favorable reading to the Employer than EX 13A, which presented a 2/2, or EX 8, which was unreadable. It is admitted over EX 13C, which was presented in a format that does not comply with the requirements of 20 C.F.R. §718.102(b). Finally, it is admitted over EX 1B and 1C because while the impressions those produced were both 1/0, EX 1D is more recent.

[24] The qualifications of Dr. Lynn and Dr. Abrahams are not present in the evidence. I take judicial notice of the qualifications of each doctor listed above. *See Maddaleni v. The Pittsburgh & Midway Coal Mining Co.,* 14 B.L.R. 1-135 (1990) aff'd 961 F.2d 1524 (10th Cir. 1992). The B-readership of each doctor is found at the National Institute for Occupational Safety and Health's Certified B-reader list, available at http://cdc.gov/niosh/topics/chestradiography/b-reader-list.html. Evidence that both Dr. Lynn and Dr. Abrahams is board certified in radiology is presented by the American Board of Medical Specialties, available at www.ambs.org. Any party contesting these findings should file a motion for reconsideration within ten days of the issuance of this Decision and Order.

CX 2	5/16/03 9/29/04	Cappiello	B-reader Board certified	1	2/3	p/p
CX 3	5/16/03 9/30/04	Amhed	B-reader Board certified	1	1/2	p/q
EX 1D	6/22/93 12/17/04	Fino	B-reader	1	1/0	p/q
EX 7	5/16/03 7/15/04	Hayes	B-reader Board certified	1		No abnormalities consistent with pneumoconiosis.
EX 13B	5/31/05 7/12/05	Abrahams	B-reader Board certified	2	2/2	t/t
EX 14	6/29/04 6/21/05	Hayes	B-reader Board certified			No abnormalities consistent with pneumoconiosis.

B. Pulmonary Function Studies[25]

Pulmonary Function Studies ("PFS") are tests performed to measure the degree of impairment of pulmonary function. They range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV). The PFS evidence is summarized in the table below.

Physician **Date** **Exhibit #**	**Age** **Height**	**FEV_1**	**MVV**	**FVC**	**Tracings**	**Comprehension** **Cooperation**	**Qualifying** **Conforming**	**Doctor's Impression**
Paul* 5/16/03 DX 17	58 65.75"	Pre: 2.09 Post: 2.05	Pre: 99.2 Post: 93	Pre: 2.86 Post: 2.62	Yes	Good Good	Pre: No Yes Post: No Yes	Mild restrictive impairment; mild obstructive impairment.
Cohen 6/29/04 CX 1	59 67"	2.09	108	2.82	Yes		No Yes	Moderately severe restrictive defect with diffusion impairment. The reduction in

[25] A "qualifying" pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718. A study "conforms" if it complies with applicable standards (found in 20 C.F.R. § 718.103(b) and (c)). (*See Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 (7th Cir. 1993)).

								diffusion is solely due to the reduction in single breath lung volume.
Fino* 10/18/04 EX 1	59 67”	Pre: 1.99 Post: 1.09		Pre: 2.67 Post: 2.70	Yes	Good Good	Pre: No Yes Post: Yes Yes	
Pickerill* 5/31/04 EX 13	60 65”	Pre: 2.03 Post: 2.12		Pre: 2.67 Post: 2.70	Yes		Pre: No Yes Post: No Yes	Mild restrictive defect; mild obstructive defect.

*Drs. Paul, Fino, and Pickerill administered the PFS both before and after the application of bronchodilators.

For a miner of the claimant's height of 67 inches, § 718.204(b)(2)(i) requires an FEV_1 equal to or less than 1.83 for a male 59 years of age.[26] If such an FEV_1 is shown, there must be in addition, an FVC equal to or less than 2.33 or an MVV equal to or less than 73; or a ratio equal to or less than 55% when the results of the FEV_1 tests are divided by the results of the FVC test.[27] Qualifying values for other relevant ages and heights are as depicted in the table below. The FEV_1/FVC ratio requirement remains constant.

Height	Age	FEV_1	FVC	MVV
67	60	1.81	2.31	72
65	60	1.65	2.12	66
65.7	59	1.73	2.21	69

[26] The fact-finder must resolve conflicting heights of the miner on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). I find the miner is 67” here, the most often reported height. It should be noted that this determination is particularly important when the discrepancies may affect whether or not the tests are “qualifying.” *Toler v. Eastern Associated Coal Co.*, 42 F.3d 3 (4th cir. 1995). This, however, is not the case here because the only qualifying result qualified because of its ratio, which remains constant.

[27] Dr. Fino's post-bronchodilator test was the only qualifying study. It qualified by way of the FEV_1/FVC ratio, which was 40%.

C. Arterial Blood Gas Studies[28]

Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. A lower level of oxygen (O_2) compared to carbon dioxide (CO_2) in the blood, expressed in percentages, indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled. The results of the arterial blood gas studies submitted in connection with this claim are summarized in the table below.

Date **Exhibit #**	**Physician**	**PCO_2**	**PO_2**	**Qualify**	**Physician's Impression**
5/16/03 DX 16	Paul	Resting: 42.5 Exercising: 37.7	Resting: 81.8 Exercising: 71.7	Resting: No Exercising: No	
6/29/04 CX 1	Cohen	39.6	82.1	No	
10/18/04 EX 1	Fino	40	78	No	
5/31/05 EX 13	Pickerill	Resting: 39 Exercising: 33	Resting: 77 Exercising: 70	Resting: No Exercising: No	Exercise terminated after 7½ minutes due to shortness of breath.

D. Physicians' Reports[29]

A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis. 20 C.F.R. § 718.202(a)(4). Where total disability cannot be established, under 20 C.F.R. § 718.204(b)(2)(i) through (iii), or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically

[28] 20 C.F.R. § 718.105 sets the quality standards for blood gas studies. 20 C.F.R. §718.204(b)(2) permits the use of such studies to establish "total disability." It provides, "In the absence of contrary probative evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability:…(2)(ii) Arterial blood gas tests show the values listed in Appendix C to this part…"

[29] Under the new 2001 regulations, expert opinions must be based on admissible evidence. *Dempsey v. Sewell Coal Co. & Director, OWCP,* 23 B.L.R. 1-47 (2004).

acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b).

There are five medical admitted as evidence in the current claim.

Dr. Jay Paul, whose qualifications are not on the record, examined the Claimant on May 16, 2003 (DX 15). His examination report notes approximately thirteen years of coal mine employment and a 31-pack-year smoking history. Dr. Paul stated that the Claimant suffers from the following symptoms: sputum, dyspnea, cough, chest pain, and paroxysmal nocturnal dyspnea.

Based on the positive chest X-ray read by Dr. Lynn and the PFS test he conducted, Dr. Paul diagnosed the Claimant with coal workers' pneumoconiosis (CWP), a mild restrictive impairment, and a mild obstructive impairment. He further documented atherosclerotic coronary artery disease and chronic bronchitis. He stated that the CWP was caused by coal dust exposure; the mild restrictive impairment was caused in part by CWP and in part by obesity; the mild obstructive impairment and the chronic bronchitis were caused by cigarette smoking; and, the cause of the atherosclerotic coronary artery disease was unknown. Dr. Paul further opined that the chronic bronchitis and mild obstructive impairment were not work limiting but that the mild restrictive impairment may be work limiting to strenuous activity in the face of an exercise-induced decrease in PO_2.

Dr. John Raffensperger, a board-certified pulmonologist, offered a consultation report dated February 5, 2005 based on his review of medical records (DX 21). He noted 13 years of coal mine employment. Dr. Raffensperger also noted the varied accounts of the Claimant's smoking history and stated that the Claimant smoked for at least 25 years. Dr. Raffensperger also noted the Claimant's exposure to asbestos. Based on his review of records, Dr. Raffesnsperger diagnosed the Claimant with a "consistent restrictive pattern" and pneumoconiosis. He further opined that the Claimant is physiologically unfit to resume his employment duties and that both his exposure to coal dust and asbestos have played substantial roles in the Claimant's disability.

Dr. Robert Cohen, a B-reader who is board-certified in internal medicine, with a subspecialty in pulmonary medicine, examined the Claimant on June 29, 2004 (CX 6). He offered an examination report dated December 22, 2004 (CX 1). In accordance with 20 C.F.R. § 725.414(c), the deposition transcript of Dr. Cohen is also considered (EX 15).[30] In his report, he noted 13 years of coal mine employment and a 30-pack-year smoking history (CX 1). He also noted the Claimant's exposure to asbestos.[31] Dr Cohen stated that the Claimant suffers from the following symptoms: shortness of breath, orthopnea, cough, sputum, and chest tightness. In

[30] Dr. Cohen's deposition was submitted to this Court without an exhibit number. It will hereinafter be referred to as EX 15.

[31] It should be noted, however, that at the hearing, the Claimant testified that Dr. Cohen did not include his exposure to asbestos in the coal mines in the medical report. Rather, Dr. Cohen only cited the Claimant's exposure to asbestos in his work prior to coal mine employment.

accordance with 20 C.F.R. § 725.414(c), the deposition transcript of Dr. Cohen is also considered (EX 15).[32]

Based on the PFS tests, X-ray evidence, biopsy evidence, and patient history, Dr. Cohen diagnosed the Claimant as having CWP, asbestosis, and more generally, a moderately severe restrictive defect with diffusion impairment. He opined that this defect is caused by CWP and asbestosis.[33] He also specifically rejected the proposition that obesity has played a role in the Claimant's pulmonary condition. Dr. Cohen further opined that the Claimant is disabled from his coal mine job.

Dr. Gregory Fino, a B-reader who is board-certified in pulmonology, examined the Claimant on October 18, 2004 (EX 1). He offered an examination report dated January 4, 2005 (EX 1) and a supplemental report dated February 17, 2005 (EX 2).[34] In accordance with 20 C.F.R. § 725.414(c), the deposition transcript of Dr. Fino is also considered (EX 15).[35] In his report he noted 13 years of coal mine employment and an approximate 30-pack-year smoking history and, in EX 2, the Claimant's exposure to asbestos. Dr. Fino stated that the Claimant suffers from the following symptoms: shortness of breath, dyspnea, daily cough with mucus production and post-nasal drip, and sleep apnea.

Dr. Fino diagnosed the Claimant as having CWP (EX 15, p. 13) and asbestosis (EX 15, p. 14). Dr. Fino further diagnosed the Claimant as having a disabling respiratory impairment characterized by an interstitial fibrotic condition manifesting itself as a true restrictive defect with a reduction in the lung volumes and diffusing capacity (EX 2).[36] Dr. Fino further opined that it is difficult to pinpoint the exact nature of the Claimant's condition (EX 2). He further opined that if occupational pneumoconiosis is responsible for the Claimant's condition, he would attribute this finding to asbestosis rather than pneumoconiosis (EX 2). He reasoned that there was not enough CWP to account for the abnormalities in lung function (EX 1).

Dr. Robert Pickerill, who is a B-reader and board certified in pulmonology, examined the Claimant on May 31, 2005. He offered an examination report, which is undated (EX 13). In that report, he noted 13 years of coal mine employment, a 33-pack-year smoking history, and the

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[32] Dr. Cohen's deposition was submitted to this Court without an exhibit number. It will hereinafter be referred to as EX 15.

[33] Dr. Cohen based his diagnosis of CWP on the Claimant's exposure to coal dust from his coal mine employment; he based his diagnosis of asbestosis on the Claimant's overall exposure to asbestos.

[34] Dr. Fino offered the supplemental report to reflect consideration of additional medical information and a corrected reading of a pathology report (EX 2).

[35] Dr. Fino's deposition was submitted to this Court without an exhibit number. It will hereinafter be referred to as EX 15.

[36] Dr. Fino considered the following inadmissible evidence in arriving at his conclusion:

1) A December 7, 1992 X-ray.
2) A June 8, 1991 X-Ray.
3) The February 5, 2004 pathology report of Dr. Everett Oesterling.
4) The October 18, 2004 X-ray.
5) Dr. Hayes's October 13, 2003 X-ray.
6) The records from the office of Dr. Calhoun.

Because medical reports must be based on admissible evidence, references to these medical records are redacted. Additionally, I ruled at the hearing that the final two sentences of DX 14 are redacted. Therefore, Dr. Fino's reference to this report is modified accordingly.

Claimant's exposure to asbestos. He stated that the Claimant suffers from the following symptoms: shortness of breath, chronic morning cough with production of sputum, occasional wheezing, chest tightness, and chronic low back pain.

Dr. Pickerill diagnosed the Claimant as having chronic pulmonary asbestosis, bilateral asbestos-related pleural plaques and diffuse pleural thickening, obstructive sleep apnea, coronary artery disease, and chronic cervical and lumbar spinal stenosis.[37] Based primarily on his review of the March 5, 1998 biopsy, the Claimant's occupational history, and chest X-rays Dr. Pickerill reasoned that the Claimant's condition was not consistent with CWP. He further opined that that Claimant's chest abnormalities were more consistent with asbestosis than pneumoconiosis. Dr. Pickerill also stated that if the Claimant does have CWP, it is unlikely that it has caused a significant functional respiratory impairment.

E. Biopsy Reports[38]

The Employer has submitted a biopsy report by Dr. Richard Naeye, dated January 24, 2004 (DX 14).[39] Dr. Naeye reviewed slides containing tissue removed from the Claimant's right lung on March 2, 1998.[40] He also reviewed the reports of Dr. Samuel Yousem and Dr. Yang Kon Kim, who also reviewed the slides.[41] Included in those reports were references to the Claimant's history of coal mine employment.

Dr. Naeye reported a single black deposit with associated fibrosis. He reasoned that this deposit is associated with the Claimant's exposure to coal dust. Based on the fibrosis associated with this abnormality, he further diagnosed CWP, but noted that the CWP affects too little lung tissue for it to have any measurable effect on lung function.

III. Hospital Records

The Employer has submitted EX 4, EX 10, and EX 11, all of which constitute hospital records under 20 C.F.R. § 725.414(a)(4).

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[37] Dr. Pickerill considered the following inadmissible evidence in arriving at his conclusion:

1) His reading of a May 31, 2005 X-ray.
2) Dr. Hoang's reading of a May 31, 2005 X-ray.
3) Dr. Fino's reading of a October 18, 2004 X-ray.

Because medical reports must be based on admissible evidence, references to these medical records are redacted. Additionally, Dr. Pickerill's reference to DX 14 is modified in accordance with my ruling on that report.

[38] 20 C.F.R. § 718.106(a) states that "a report of [a]…biopsy submitted in connection with a claim shall include a detailed gross macroscopic and microscopic description of the lungs or visualized portion of the lungs." 20 C.F.R. § 725.414(a)(2)(i) & (3)(i) state that "[a party]may submit no more than one report of each biopsy in support of its position."

[39] At the hearing, Claimant objected to the admission of this report. Claimant argued that DX 14 constitutes a medical report and, as such, would be in excess of the Employer's limitation on medical reports under the Regulations. I ruled that if the last two sentences of DX 14 were redacted, it would constitute a biopsy report. Therefore, DX 14 is admitted, but the last two sentences are redacted.

[40] This procedure is reported in EX 4 and EX 11.

[41] Because those reports were written in connection with the Claimant's hospitalization for a respiratory condition, their admission does not affect the evidence limitations of § 725.414. *See* 20 C.F.R. 725.414(a)(4).

EX 11 contains records of treatment from Butler Memorial Hospital from 1997-2003. This includes two overnight polysomnography procedures, both of which resulted in diagnoses of sleep apnea. It also includes a PFS test conducted on October 28, 2003, which produced non-qualifying values.[42] It also includes a March 2, 1998 lung biopsy, upon which Dr. David Dimarco diagnosed idiopathic fibrosis alveolitis, emphysema, pleurisy, sleep apnea, and CWP.

Drs. Yang Kon Kim and Samuel Yousem each offered biopsy reports in connection with the Claimant's treatment at Butler Memorial Hospital (EX 4). In his March 3, 1998 report, Dr. Kim diagnosed organizing diffuse alveolar damage with interstitial fibrosis and chronic inflammation, pulmonary emphysema, plulmonary edema, and pleural fibrosis. In his report dated March 25, 1998, Dr. Yousem opined that the biopsy showed numerous ferrunginous bodies and interstitial fibrosis. He concluded that his findings were consistent with asbestosis.[43]

EX 10 contains hospitalization records from Allegheny Valley Hospital, which document four hospitalizations. The Claimant was hospitalized in at Allegheny Valley Hospital in 1999 for an allergic reaction to medication, in March, 2000 for coronary bypass surgery, in April, 2000, and in May, 2000, both for shortness of breath after the surgery. These records include an ABG study conducted on April 4, 2000, which contains non-qualifying values.[44] A CT of the chest, dated April 4, 2000, is also included. It reveled moderate left effusion, diffuse prominence of lung markings, a small nodule on the right lower lung measuring one centimeter, and tiny nodules in the right base measuring four millimeters. A spiral CT scan on May 16, 2000 was negative for pulmonary embolus. The records also included chest X-ray reports, which documented pleural effusion, pleural thickening, pulmonary fibrosis, vascular congestion, and interstitial markings.

IV. Physician Office Notes

The Employer has submitted EX 5 and EX 9, both of which constitute physicians notes, admissible under 20 C.F.R. § 725.414(a)(4).

EX 5 contains treatment records from Drs. Frederic Acevedo and Mario Kinsella, documenting examinations and medical impressions of the Claimant from 1997-2004. These records chronicle the Claimant's treatment for his pulmonary condition, including examinations before and after the treatments described in EX 4, EX 10, and EX 11. Drs. Acevedo and Kinsella consistently report that the Claimant suffers from obstructive sleep apnea, asbestosis, and restrictive lung disease. On several occasions, they opined that the Claimant's asbestosis is the primary cause of his pulmonary condition and the restrictive lung disease is secondary. They consistently based their impression of asbestosis primarily on the lung biopsy described in EX 10 and EX 4.

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[42] The PFS test produced an FEV_1 of 2.06, an FVC of 2.44, and a ratio of .84.

[43] Dr. Yousem also noted the claimant's history of coal mine employment. However, he found no dust macules or silicotic nodules. He therefore concluded that the pneumoconiosis found in the Claimant is "largely related to asbestos exposure."

[44] That ABG study produced a PCO_2 and a PO_2 of 72.

EX 9 consists of two letters from Dr. Gerald Weinstein to Dr. Susan Schwartz reporting on the Claimant's condition after his coronary bypass surgery. In those letters, Dr. Weinstein reports that the Claimant suffers from continued shortness of breath, which he attributes to asbestosis rather than his heart surgery.

V. Witness Testimony

The Claimant testified about his employment history, which involved coal mine employment repairing equipment as a mechanic (TR. 10-11). He also testified that he was exposed to coal dust and asbestos in the coal mines (TR 11, 18). He further testified that he was exposed to silica dust, binder dust, asbestos, and limestone dust in his work at a foundry, which predated his coal mine employment.

The Claimant also testified as to his medical condition, stating that his breathing problems have significantly impeded his life activities (TR 12).

The Claimant also testified as to his medical treatment. He stated that he has seen Drs. Kinsella and Acevedo for approximately six years for treatment for sleep apnea and a breathing disease (TR 15-16). He saw Dr. Cohen in 2004 and testified that Dr. Cohen erroneously omitted his exposure to asbestos in the coal mines from the work history account contained in his report.

VI. Evidence from Prior Claims

Because there exists a material change in the Claimant's condition since the most recent prior denial of his claim, the evidence from his first two claims is considered for this claim. 20 C.F.R. § 725.309(d)(1).[45]

The Claimant's second claim included the following medical evidence:

1) Two Chest X-ray readings, which produced impressions of 1/0 and 0/1, respectively.
2) Two non-qualifying PFS tests.
3) One non-qualifying ABG study.
4) Two medical reports. The first, offered by Dr. Acevedo on November 18, 1996, concluded that there was no diagnosis of cardiopulmonary impairment. The second, offered by Dr. Fino on January 2, 1997, concluded that the Claimant had an occupationally acquired pulmonary condition but that it resulted in neither a respiratory impairment nor a disability (DX 2).

The Claimant's first claim included the following medical evidence:

1) Twenty five chest X-ray readings, which reported the following impressions
    a. Twelve readings were negative.
    b. Three reported an impression of 0/1.
    c. Two reported impressions of 1/0.
    d. Two reported impressions of 1/2.
    e. Four reported impressions of 2/1.

[45] For a discussion of why a material change exists, see *infra* Part A.

f. Two reported impressions of 2/2.

2) Five non-qualifying PFS tests.
3) One non-qualifying ABG study.
4) Treatment records from Dr. Karen Rendt from 1992-94.
5) Hospital records from May, 1994 detailing the Claimant's hospitalization for a surgical procedure relating to lumbar stenosis.
6) Six medical reports. The first, offered by Dr. Paul on December 1, 1992, reported an obstructive impairment, but concluded that the impairment was not work-limiting. The second, offered by Dr. Scott on January 26, 1993, reported a mild impairment of the respiratory system that was not totally disabling and no evidence of an occupational lung disease. The third, offered by Dr. Macy Levine on June 30, 1993, reported a totally disabling disability due to pneumoconiosis due to coal dust. The fourth, offered by Dr. Scott on November 25, 1994, stated that the Claimant has CWP and a mild restrictive impairment but is not totally disabled. The fifth, offered by Dr. Bruce Bush on June 8, 1994, reported insufficient evidence to diagnose CWP or any other occupationally related lung disease. The sixth, offered by Dr. Levine on November 22, 1994, reported pneumoconiosis due to coal dust, which has resulted in total disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Entitlement to Benefits

This claim must be adjudicated under the regulations at 20 C.F.R. Part 718 because it was filed after March 31, 1980. Under this Part, the claimant must establish, by a preponderance of the evidence, that: (1) he has pneumoconiosis; (2) his pneumoconiosis arose out of coal mine employment; (3) he is totally disabled; (4) the pneumoconiosis contributes to the total disability. 20 C.F.R. § 725.202(d)(2) (citing 20 C.F.R. § 718.202-204). Failure to establish any one of these elements precludes entitlement to benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987); and, *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). The claimant bears the burden of proving each element of the claim by a preponderance of the evidence, except insofar as a presumption may apply. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 1320 (3rd Cr. 1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). Moreover, "[T]he presence of evidence favorable to the claimant or even a tie in the proof will not suffice to meet that burden." *Eastover Mining Co. v. Director, OWCP [Williams]*,338 F.3d 501, No. 01-4064 (6th Cir. July 31, 2003), *citing Greenwhich Collieries [Ondecko]*, 512 U.S. 267 at 281.

Since this is the claimant's third claim for benefits, and it was filed on or after January 19, 2001, it must be adjudicated under the new regulations.[46] Although the new regulations

[46] Section 725.309(d)(For duplicate claims filed on or after Jan. 19, 2001)(65 Fed. Reg. 80057 & 80067):

(d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subpart E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see Sections 725.202(d)(miner), 725.212(spouse),

dispense with the "material change in conditions" language of the older regulations, the criteria remain similar to the "one-element" standard set forth by the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994)[47], which was adopted by the United States Court of Appeals for the Fourth Circuit, in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) *rev'g* 57 F.3d 402 (4th Cir. 1995), *cert. den.* 117 S.Ct. 763 (1997). In *Dempsey v. Sewell Coal Co. & Director, OWCP,* 23 B.L.R. 1-53 (2004), the Board held that where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement…has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. Section 725.309(d); *White v. New White Coal Co., Inc*., 23 B.L.R. 1-1, 1-3 (2004). According to the Board, the "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. Section 725.309(d)(2).

To assess whether a material change in conditions is established, the Administrative Law Judge ("Administrative Law Judge") must consider all of the new evidence, favorable and unfavorable, and determine whether the claimant has proven, at least one of the elements of entitlement previously adjudicated against him in the prior denial. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) *rev'g* 57 F.3d 402 (4th Cir. 1995), *cert. den.* 117 S.Ct. 763 (1997); *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994); and *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 B.L.R. 2-76 (3rd Cir. 1995).[48] *See Hobbs v.*

725.218(child), and 725.222(parent, brother or sister)) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:

(1) any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

(2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement. A subsequent claim filed by a surviving spouse, child, parent, brother, or sister shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death.

(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

(5) In any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

[47] Reiterated in *Grundy Mining Co. v. Director, OWCP*[*Flynn*], 353 F.3d 467 (6th Cir. 2003).

[48] *Allen v. Mead Corp*. , 22 B.L.R. 1-61 (2000). In Circuits which have not addressed the standard applicable to duplicate claims, under 20 C.F.R. 725.309, the Board overruled its position, in *Shupink v. LTV Steel Co*., 17 B.L.R. 1-24 (1992), and adopted the position articulated in *Peabody Coal Co. v. Spese*, 117 F.3d 1001 (7th Cir. 1997)(*en banc*). That is, to establish a material change in conditions, a claimant must establish, with evidence developed subsequent to the denial of the earlier claim, at least one of the elements of entitlement previously adjudicated against him or her.

Clinchfield Coal Co., 917 F.2d 790, 792 (4th Cir. 1990). If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change.

In *Caudill v. Arch of Kentucky, Inc.*, 22 B.R.B. 1-97, BRB No. 98-1502 (Sept. 29, 2000)(*en banc on recon.*), the Benefits Review Board held the "material change" standard of section 725.309 "requires an adverse finding on an element of entitlement because it is necessary to establish a baseline from which to gauge whether a material change in conditions has occurred." Unless an element has previously been adjudicated against a claimant, "new evidence cannot establish that a miner's condition has changed with respect to that element."

The Claimant's most recent prior claim was denied at the District Director level because "the evidence…[did] not show [the Claimant was] totally disabled by the disease." (DX 2). Therefore, the most recent denial was based on the Claimant's failure to establish the third and fourth conditions for entitlement under § 725.202(d), namely, that he is totally disabled and that pneumoconiosis contributes to the disability. Under the *Sharondale* standard, the claimant must show the existence of one of these elements by way of newly submitted medical evidence in order to show that a material change in condition has occurred. If he can show that a material change has occurred, then the entire record must be considered in determining whether he is entitled to benefits.

The Claimant has shown a material change in condition regarding total disability. Employer has stipulated to total disability, stating in its closing brief to this Court that, "Dr. Fino has found that the Claimant is totally disabled. Employer stipulates that the Claimant has established total disability pursuant to § 718.204(b)(2)(iv)." (Employer's Closing Brief, 44, n.12). A stipulation of fact made by a party is binding upon the parties and upon the trier of fact. *Nippes v. Florence Mining Co.,* 12 B.L.R. 1-108 (1985).[49] Based on this stipulation, I find that the Claimant was totally disabled. Therefore, the Claimant has shown that a material change in condition has occurred and the entire record will be considered in determining whether he is entitled to benefits.

B. Existence of Pneumoconiosis

Pneumoconiosis is defined as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment."[50] 30

[49] In *Nippes*, as in this case, the attorney of one party stipulated to a fact adverse to its interests. The Board held that such a statement was binding as to the finding of that fact.

[50] Pneumoconiosis is a progressive and irreversible disease; once present, it does not go away. *Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 151 (1987); *Lisa Lee Mines v. Director*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) at 1362; *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995) at 314-315. In *Henley v. Cowan and Co*., 21 B.L.R. 1-148 (May 11, 1999), the Board holds that aggravation of a pulmonary condition by dust exposure in coal mine employment must be "significant and permanent" in order to qualify as CWP, under the Act. In *Workman v. Eastern Associated Coal Corp.,* 23 B.L.R. 1-22, BRB No. 02-0727 BLA (Aug. 19, 2004)(order on recon)(*En banc*) the Board ruled that because the potential for progressivity and latency is inherent in every case, a miner who proves the presence of pneumoconiosis that was not manifest at the cessation of his coal mine employment, or who proves that his pneumoconiosis is currently disabling when it was previously not, has demonstrated that the disease from which he suffers is of a progressive nature. In amending section 718.201, DOL concluded chronic dust diseases of the lung and its sequelae arising out of coal mine employment "may be latent and progressive, albeit in a minority of cases." *See* 64 Fed. Reg. 54978-79 (Oct. 8, 1999); 65 Fed. Reg. 79937-44, 79968-72 (Dec. 20, 2000); 68 Fed. Reg.

U.S.C. § 902(b) and 20 C.F.R. § 718.201. The definition is not confined to "coal workers' pneumoconiosis," but also includes other diseases arising out of coal mine employment, such as anthracosilisosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R. § 718.201.[51]

The term "arising out of coal mine employment" is defined as including "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[52] Thus, "pneumoconiosis", as defined by the Act, has a much broader legal meaning than does the medical definition.

Thus, asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983). Likewise, chronic obstructive pulmonary disease may be encompassed within the legal definition of pneumoconiosis. *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995) and *see* § 718.201(a)(2).

69930-31 (Dec. 15, 2003). "Although every case of pneumoconiosis does not possess these characteristics, the regulation was designed to prevent operators from asserting that pneumoconiosis is never latent and progressive. 20 C.F.R. Section 718.201(c); *see National Mining Association, et al, v. Chao, Sec. of Labor,* 160 F. Supp. 2d 47 (D.D.C. Aug. 9, 2001) *aff'd*, 292 F.3d 849 (D.C. Cir. 2002)(*"NMA")*, 292 F.3d at 863."
Midland Coal Co. v. Director, OWCP[Shores], 358 F.3d 486 (7th Cir. 2004). Seventh Circuit upheld DOL's 2001 definition of CWP as a latent and progressive disease. DOL's regulation, on this scientific finding is entitled to deference. It is designed to prevent operators from claiming CWP is never latent and progressive.

[51] Regulatory amendments, effective January 19, 2001, state:

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.

(1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.
(Emphasis added).

[52] The definition of pneumoconiosis, in 20 C.F.R. section 718.201, does not contain a requirement that "coal dust specific diseases …attain the status of an "impairment" to be so classified. The definition is satisfied "whenever one of these diseases is present in the miner at a detectable level; whether or not the particular disease exists to such an extent as to become compensable is a separate question." Moreover, the legal definition of pneumoconiosis "encompasses a wide variety of conditions; among those are diseases whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary symptomatology have nevertheless been made worse by coal dust exposure. *See, e.g., Warth*, 60 F.3d at 175." *Clinchfield Coal v. Fuller*, 180 F.3d 622 (4th Cir. June 25, 1999) at 625.

The claimant has the burden of proving the existence of pneumoconiosis. The Regulations provide the means of establishing the existence of pneumoconiosis by:[53] (1) a chest X-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a)(1); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106;[54] (3) application of the irrebuttable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion.[55] 20 C.F.R. § 718.202(a)(4).

The Third Circuit has held that the four methods of establishing the existence of the disease, provided in 20 C.F.R. § 718.202, are not to be considered in the disjunctive; that is, relevant evidence developed under the four methods of proof are to be considered together to determine whether a claimant has pneumoconiosis. *Penn Allegheny Coal Co. v. Williams & Director, OWCP*, 114 F.3d 22 (3d Cir., 1997) *Citing* 30 U.S.C. § 923(b) and *Kertesz v. Cresent Hills Coal Co.*, 788 F.2d 158 (3d Cir. 1986).

In his Decision and Order, Judge Tierney found that the preponderance of the evidence establishes the existence of pneumoconiosis. In a subsequent claim, an administrative law judge is not bound by the findings made in connection with a prior claim. 20 C.F.R. § 309(d)(4). However, I adopt Judge Tierney's finding that the Claimant has established the presence of pneumoconiosis. This finding is buttressed by the chest X-ray[56], medical report[57], and biopsy evidence.[58]

Therefore, I find that the Claimant has met his burden of establishing the presence of pneumoconiosis.

C. Cause of Pneumoconiosis

Once the miner is found to have pneumoconiosis, he must show that it arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). If a miner who is suffering from

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[53] 20 C.F.R. § 718.305 creates a rebuttable presumption of pneumoconiosis under certain facts for claims filed before Jan. 1, 1982. 20 C.F.R. § 718.306 establishes a presumption of entitlement applicable to certain death cases where the miner died on or before Mar. 1, 1978.

[54] A negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis, but positive results will constitute evidence of the presence of pneumoconiosis. 20 C.F.R. § 718.106(c).

[55] In accordance with the Board's guidance, I find each medical opinion documented and reasoned, unless otherwise noted. *Collins v. J & L Steel,* 21 B.L.R. 1-182 (1999) *citing Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); and, *Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438, 21 B.L.R. 2-269 (4th Cir. 1997). This is the case, because except as otherwise noted, they are "documented" (medical), i.e., the reports set forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis and "reasoned" since the documentation supports the doctor's assessment of the miner's health.

[56] Seventeen of the thirty-five chest X-rays indicate the presence of pneumoconiosis under the standard put forth by the Regulations. Of particular note, however, is that six of the eight admissible chest X-rays submitted in connection with the current claim are positive. Because of the progressive nature of the disease, I accord greater weight to those X-rays than those submitted in connection with the prior claims. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

[57] Six medical opinions include a finding of pneumoconiosis: DX 15, DX 21, CX 1, and three reports submitted in connection with the first claim (i.e. the November 25, 1994 report of Dr. Scott, and the two reports of Dr. Levine).

[58] Dr. Naeye's review of the March 2, 1998 biopsy includes a finding of pneumoconiosis (DX 14).

pneumoconiosis was employed for ten years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R § 718.203(b). If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of coal mine employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c).

In his Decision and Order, Judge Tierney noted the Employer's stipulation of thirteen years of coal mine employment; therefore, the Claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment. (DX 1). Judge Tierney further found that the presumption had not been rebutted.

Any stipulation made by a party in a prior claim is binding on that party in the adjudication of a subsequent claim. 20 C.F.R. § 725.309(d)(4). Therefore, the stipulation of thirteen years remains in effect in the current claim and, thus, the Claimant is similarly entitled to the aforementioned presumption. Moreover, I also find that the presumption has not been rebutted. Therefore, the Claimant has established that his pneumoconiosis arose out of coal mine employment.

D. Total Disability

The Claimant must also show that he is totally disabled. 20 C.F.R. § 725.202(d)(2)(iii); 20 C.F.R. § 718.204(c). As noted *supra*, the Employer has stipulated that the Claimant is totally disabled. Therefore, the Claimant has established total disability.

E. Cause of Total Disability[59]

The Claimant is required to demonstrate that his pneumoconiosis contributes to his total disability. 20 C.F.R. § 725.202(d)(2)(iv). To establish this element, the Regulations require the pneumoconiosis to be a "substantially contributing cause of the miner's total disabling respiratory or pulmonary impairment."[60] The Claimant bears the burden of establishing that total disability was caused by pneumoconiosis by a preponderance of the evidence. *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65 (1986).

The 2001 Amendments to the Regulations added the aforementioned statutory definition of "disability causation."[61] In *Gross v. Dominion Coal Corp.*, 23 B.L.R. 1-8, the Board announced two important point of law regarding the post-Amendment consideration of disability causation. First, it stated that a finding that pneumoconiosis was one of two causes of total

[59] In *Billings v. Harlan #4 Coal Co.*, BRB No. 94-3721 (June 19, 1997) (en banc)(unpublished), the Board has held that the issues of total disability and causation are independent.

[60] 20 C.F.R. § 718.204(c)(1). The Regulations further state that "[p]neumoconiosis is a 'substantially contributing cause' of the miner's disability if it:

(i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or,

(ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

[61] Prior to the Amendments, this standard was adjudicated using varying standards derived from precedent. These standards varied from Circuit to Circuit. *See* 65 Fed. Reg. 245, 79946 (stating, "The Department also proposed a definition for 'disability causation' to harmonize the various formulations of that standard in circuit court decisions.'").

disability satisfied the "material adverse effect" prong of the "substantially contributing cause" requirement. *Gross* at 1-18. Second, it stated that pre-Amendment circuit court precedent is relevant in interpreting the post-Amendment disability causation standard. *Id*. Following that vein, the Third Circuit announced in *Bonessa v. United States Steel Corp*., 884 F.2d 726 (3d Cir. 1989), that disability causation does not require a showing that pneumoconiosis was the sole cause of the total disability. Therefore, in following both Board and Third Circuit interpretations, disability causation may be met where pneumoconiosis was one of multiple causes of total disability.

To ascertain whether the Claimant has demonstrated that total disability was caused by pneumoconiosis in this case, it is necessary to make three separate but related inquiries: (1) The characterization of the pneumoconiosis; (2) The credibility of the medical reports submitted in connection with this claim must be assessed; and, (3) Whether the pneumoconiosis, as characterized in the first inquiry, substantially contributes to the Claimant's total disability, given the evidence presented by the medical reports.

1. Characterization of Pneumoconiosis

The parties are in dispute as to specifically what dust exposure precipitated the Claimant's total disability. The record reflects that the Claimant was exposed to coal dust while he was engaged in coal mine employment (TR 11). The record also reflects that the Claimant was exposed to asbestos in his work that predates his coal mine employment (TR 11-12). What is primarily in dispute, however, is whether the Claimant was exposed to asbestos while working in the coal mines.

I find that the preponderance of the evidence supports a finding that the Claimant was exposed to asbestos while engaged in coal mine employment. The factual evidence is in conflict; none of it singularly provides a conclusive answer to this question. At the hearing, the Claimant testified under oath that he was exposed to asbestos while working in the coal mines as a mechanic for Republic Steel. In his deposition, Dr. Cohen testified that the Claimant reported asbestos exposure while working in the coal mines for LTV Steel.[62] Finally, in three treatment records submitted in connection with the first claim, Dr. Karen Rendt reported that the Claimant had a "[History] of asbestos exposure from coal mining." (DX 2).[63] In contrast, Dr. Fino testified at his deposition that the Claimant denied asbestos exposure in the coal mines at his examination (EX 15, p. 19).[64]

Therefore, Drs. Cohen and Fino have each offered deposition testimony reporting contradictory answers by the Claimant when asked about asbestos exposure in the coal mines. Yet, neither recorded this information nor incorporated it into his respective medical report. The Claimant's sworn testimony, however, counsels toward a finding that he was exposed to asbestos while working in the coal mines. Moreover, his testimony is supported by the records of Dr.

[62] The Claimant testified that Republic Steel and LTV Steel were the same employer (TR 10). Additionally, this Court takes note of the fact that Dr. Cohen did not report this information in his medical report.
[63] These three reports are dated June 23, 1993, March 10, 1993, and December 4, 1992.
[64] Dr. Fino, however, also did not record this response in his medical report.

Rendt, who recorded a similar history over a decade ago. Therefore, the weight of the evidence supports a finding that the Claimant was exposed to asbestos while working for Republic Steel.[65]

As noted, *supra*, "pneumoconiosis," as defined by the Regulations, consists of "a chronic dust disease…arising out of coal mine employment." 20 C.F.R. § 718.201(a). A disease "aris[es] our of coal mine employment" if it is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). The Board has adhered to an expansive consideration of "dust" relevant to the Act, stating that it "is not limited to dust from the substance of coal itself, but includes all dust from any substance arising from the extraction or preparation of coal." *Garrett v. Cowin & Co., Inc.*, 16 B.L.R. 1-77, 1-81 (1990).[66]

In accordance with this standard and the aforementioned finding of fact, I find that the Claimant's coal dust exposure from his thirteen years of coal mine employment and asbestos exposure from his three years of coal mine work as a mechanic for Republic Steel constitute his pneumoconiosis as defined by the Regulations.[67]

2. Credibility of Medical Reports

Thirteen medical reports have been submitted in connection with this claim. Five have been submitted in connection with the current claim and eight in connection with the two prior claims. I accord the five submitted in connection with the current claim weight over those submitted in connection with the prior claim for two reasons: (1) First, because of the progressive nature of pneumoconiosis, medical reports submitted conducted significantly more recently are more relevant in assessing the Claimant's condition; (2) The eight reports submitted for the prior claims were written before the March 2, 1998 biopsy, which resulted in a diagnosis of asbestosis. Therefore, these earlier reports do not contain a consideration of this condition. I accordingly find them to reflect a less complete account of the Claimant's condition than those submitted in connection with the current claim.

To be credited, a medical report must be both well-documented and well-reasoned. A "documented" report sets forth the clinical findings, observations, and facts on which the doctor has based the diagnosis. *Fields v. Director, OWCP*, 10 B.L.R. 1-19 (1987). A report is "reasoned" if the documentation supports the doctor's assessment of the miner's health. *Id*. Upon finding a medical report to be unreasoned, an Administrative Law Judge may reject it entirely or accord it diminished weight in crediting its conclusions. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989). None of the five medical opinions is without credibility defects.

The failure of Dr. Cohen's report to document the Claimant's exposure to asbestos in his coal mine employment bears adversely on its documentation. However, this defect is not fatal as

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[65] Dr. Cohen stated that the Claimant held two different jobs with Republic Steel- a shuttle car operator from 1977-1979 and a mechanic from 1979-1982. Dr. Cohen only cited asbestos exposure in the Claimant's work as a mechanic. At the hearing, the Claimant did not specify during which years at Republic Steel he incurred asbestos exposure; however, he did indicate that this exposure occurred when he was employed as a mechanic. Therefore, I find that the Claimant's exposure to asbestos while in coal mine employment occurred from 1979-1982.

[66] *Accord Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865, 869 (3d Cir. 1986)(stating that in enacting the Act, Congress "referr[ed] to the various dusts around a coal mine.").

[67] Accordingly, the Claimant's asbestos exposure that predated his coal mine employment is excluded as an element of his pneumoconiosis.

it likely had little impact on Dr. Cohen's ultimate conclusion. Dr. Cohen diagnosed asbestosis without reference to additional asbestos exposure; therefore, he likely would have diagnosed asbestosis had his documentation been complete. Therefore, the credibility of his report is only minimally diminished by this omission.

Dr. Paul's report is well-documented and well-reasoned; however it is accorded less weight because it does not include a consideration of the Claimant's asbestos exposure. In *Stark v. Director*, 9 B.L.R. 1-36 (1986), the Board ruled that an Administrative Law Judge may accord a medical report less weight if it does not present a complete picture of the claimant's health. In this case, because the four other medical reports submitted in connection with the current claim all consider the Claimant's exposure to asbestos, Dr. Paul's report presents a significantly less complete picture of the Claimant's health because he did not consider it. Therefore, Dr. Paul's conclusions regarding the Claimant's condition are accorded diminished weight.

Dr. Raffensperger's diagnosis of CWP is well-documented and well-reasoned. However, the report is vague in its consideration of asbestos. Dr. Raffensperger makes two references to the effect of the Claimant's asbestos exposure. He stated that "[h]is picture is somewhat complicated by the fact that he has exposure to both coal dust and asbestos…" He also stated that "the previous asbestos exposure is playing a substantial role in his disability." However, while noting that asbestos exposure has affected the Claimant's health, Dr. Raffensperger makes no diagnosis regarding that affect. Therefore, his consideration of the Claimant's asbestos exposure is vague and the weight of his conclusions is diminished accordingly.

Dr. Pickerill's report is accorded diminished weight for two reasons. First, he referred to three chest X-rays that have been excluded. Second, he offered an opinion on the effect of CWP on the Claimant's disability causation after opining that the Claimant does not suffer from CWP.

With respect to the first defect, 20 C.F.R. § 725.414 requires that any X-ray referenced in a medical report must be admissible. An Administrative Law Judge may accord diminished weight to a medical report if the report references an inadmissible X-ray reading. *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-53, 1-66 (2004). Because three chest X-ray readings contributed to Dr. Pickerill's overall conclusion, his opinion is accorded diminished weight.

The Third Circuit's decision in *Soubik v. Director, OWCP*, 366 F.3d 226 (3d Cir. 2004) is instructive as to the second defect. In that case, a physician offered an expert opinion in which he stated that Claimant did not have pneumoconiosis but if he did, it did not contribute to his death. The Court termed this statement a "superficial 'hypothetical'" and commented that "[c]ommon sense suggests that it is usually difficult for a doctor to properly assess the contribution, if any, of pneumoconiosis to a miner's death if he/she does not believe it was present." *Soubik* 366 F.3d at 234. Similarly, Dr. Pickerill first stated that he "he cannot diagnose [CWP]" but then stated, "[h]owever, if [the Claimant] does have a minimal degree of simple coal workers' pneumoconiosis…it is likely that the coal workers' pneumoconiosis component has not caused a significant functional respiratory impairment." (EX 13). Therefore, similar to the

opinion in *Soubik*, this disability causation conclusion constitutes a "superficial hypothetical" and its probative weight is diminished accordingly. [68]

Dr. Fino's diagnoses of CWP and asbestosis are well reasoned and well documented. However, his conclusion that asbestosis rather than pneumoconiosis has caused the Claimant's total disability is problematic for two reasons. First, much of his conclusion on disability causation is based on his reading of two X-rays- one in 1996 and one in 2004, and the lack of progression demonstrated by a comparison between the two. (EX 14, 17, 37). However, his reading of the 2004 X-ray has been excluded because, as noted *supra*, the Employer failed to comply with the October 26, 2005 Order. Therefore, pursuant to *Dempsey*, Dr. Fino's report is accorded diminished weight for its reliance on an inadmissible X-ray.[69]

Additionally, I find Dr. Fino's conclusion on disability causation to be unreasoned. To that end, even if his 2004 X-ray reading were admissible, his conclusion that his two readings do not show progression is not supported by the myriad X-ray evidence that does show progression. Specifically, Dr. Fino's 1996 X-ray reading showed an impression of 1/0; five of the eight X-ray readings admitted in connection with the current claim show an impression of greater than 1/0. Additionally, in the first claim, only 40% of the X-ray readings were positive for the presence of pneumoconiosis as defined by the Regulations. However, 75% of the X-ray readings admitted in connection with the current claim show positive impressions. Therefore, Dr. Fino's conclusion that the Claimant's CWP showed no progression is not supported by the breadth of the evidence. As this point is central to his conclusion on disability causation, the weight of that conclusion is diminished significantly.

3. Determination of Substantial Contribution

I find that the weight of the evidence establishes that the Claimant's pneumoconiosis substantially contributed to his total disability.

Taken in total, the medical evidence supports the conclusion that the Claimant suffers from both asbestosis and CWP. Each of the five medical opinions submitted in connection with this claim diagnose the Claimant with either or both medical conditions. The objective medical evidence also documents the presence of each disease. Moreover, while the record does not

[68] It should be noted that in *Soubik*, the Court also invalidated the physician's opinion because the finding of pneumoconiosis was contrary to the finding of the Administrative Law Judge that the claimant in that case did suffer from pneumoconiosis. This point, however, is inapplicable to this case because Dr. Pickerill stated only that the Claimant does not suffer from CWP; he did not address legal pneumoconiosis. As noted in *supra* Section E1, I find that the Claimant's pneumoconiosis arose from both coal dust exposure and asbestos exposure in the coal mines. Therefore, I have found that the Claimant's pneumoconiosis is of both the clinical and legal varieties. This distinction, however, does not pertain to the "superficial hypothetical" point as discussed above because whether Dr. Pickerill is discussing CWP or legal pneumoconiosis, his conclusion on disability causation is still troublesome because he included an element in his conclusion that he expressly discounted earlier in his report. Therefore, *Soubik* bears adversely on the credibility of Dr. Pickerill's disability causation conclusion on the singular point that it constitutes a superficial hypothetical.

[69] Moreover, in *Dempsey*, the Board held that the degree of diminished weight in such a situation may be proportional to the degree of reliance on the inadmissible X-ray. Because I find that Dr. Fino relied substantially on this inadmissible X-ray in arriving at his conclusion, the weight of that conclusion is diminished substantially.

establish the degree to which each disease factors into the Claimant's total disability, it does establish that each has contributed.

The finding that each disease contributes to the Claimant's total disability supports the conclusion that pneumoconiosis accounts for a substantial contribution. As stated above, the Claimant was exposed to asbestos in both his coal mine and pre-coal mine employment. Given the medical diagnosis of asbestosis, I find that both exposures have contributed to his asbestosis. His diagnosis of CWP is a direct result of his exposure to coal dust during coal mine employment. Therefore, his pneumoconiosis, as characterized above, has contributed to both his CWP and asbestosis. Because pneumoconiosis contributed to both diseases, and both diseases have resulted in the Claimant's total disability, I find that pneumoconiosis substantially contributes to the Claimant's total disability.[70]

F. Date of Entitlement

Benefits are payable beginning with the month of the onset of total disability due to pneumoconiosis. 20 C.F.R. § 725.503. The miner is entitled to benefits as of May 16, 2003, the date of the earliest chest X-ray submitted in connection with the current claim, as this X-ray has produced three positive readings for pneumoconiosis. Given that the group of X-rays submitted in connection with the current claim has proven central to the medical opinions that have established total disability and disability causation, I find that the first reading of this group of X-rays establishes the onset date.[71]

ATTORNEY FEES

An application by the claimant's attorney for approval of a fee has not been received; therefore no award of attorney's fees for services is made. Thirty days is hereby allowed to the claimant's counsel for the submission of such an application. Counsels' attention is directed to 20 C.F.R. §§ 725.365-725.366. A service sheet showing that service has been made upon all the parties, including the claimant, must accompany the application. Parties have ten days following receipt of any such application within which to file any objections. The Act prohibits charging a fee in the absence of an approved application.

[70] It is here that *Gross* and *Bonessa* is instructive as it is also true that the Claimant's pre-coal mine employment exposure to asbestos has also contributed to his total disability. This exposure is not included as an element of his pneumoconiosis. Therefore, there is more than one cause of the Claimant's total disability. However, pursuant to *Gross*, multiple causes of total disability do not defeat the conclusion that pneumoconiosis was a substantial contributor. Similarly, pursuant to *Bonessa*, disability causation does not require a showing that pneumoconiosis is the sole cause of the Claimant's total disability to establish this element of entitlement. Therefore, the fact that the Claimant's pre-coal mine employment asbestos exposure also contributed to his total disability does not defeat his establishment of this element of entitlement.

[71] In *Cannelton Industries, Inc. v. Director, OWCP[Frye],* Case No. 03-1232 (4th Cir. April 5, 2004), the Court affirmed Administrative Law Judge's use of X-ray dates to establish the onset date. In that case, the Administrative Law Judge found "0/1" readings between 1986 and 1996 to find opacities present (not CWP) and supported an onset date by 1997 when an x-ray produced a category 1 interpretation.

CONCLUSIONS

In conclusion, the Claimant has established that a material change in condition has taken place since the previous denial, because he is now totally disabled and his total disability is due to pneumoconiosis. Therefore, the Claimant has established the elements of entitlement under the Act. The Claimant has pneumoconiosis, as defined by the Act and Regulations. The pneumoconiosis arose out of his coal mine employment. The claimant is totally disabled. His total disability is due to pneumoconiosis. He is therefore entitled to benefits.

ORDER[72]

It is ordered that the claim of WILLIAM VENESKY for benefits under the Black Lung Benefits Act is hereby GRANTED

It is further ordered that the employer, PENN ALLEGHENY COAL CO, INC. shall pay[73] to the claimant all benefits to which he is entitled under the Act commencing May 1, 2003.[74]

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RICHARD A. MORGAN
Administrative Law Judge

[72] § 725.478 Filing and service of decision and order (Change effective Jan. 19, 2001). Upon receipt of a decision and order by the DCMWC, the decision and order shall be considered to be filed in the office of the district director, and shall become effective on that date.

[73] 20 C.F.R. § 725.502(a)(1)(65 Fed. Reg. 80085, Dec. 20, 2000) provides "Benefits shall be considered due after the issuance of an effective order requiring the payment of benefits by a district director, administrative law judge, Benefits Review Board, or court, notwithstanding the pendency of a motion for reconsideration before an administrative law judge or an appeal to the Board or court, except that benefits shall not be considered due where the payment of such benefits has been stayed by the Benefits Review Board or appropriate court. An effective order shall remain in effect unless it is vacated."

[74] 20 C.F.R. § 725.530 (within 30 days of this order). In any case in which the fund has paid benefits on behalf of an operator or employer, the latter shall simultaneously with the first payment of benefits to the beneficiary, reimburse the fund (with interest) for the full amount of all such payments. 20 C.F.R. § 725.602(a).

If an employer does not pay benefits after the Director's initial determination of eligibility, it may be ordered to pay the beneficiary simple interest on all past due benefits (and attorney's fee) at a rate according to the Internal Revenue Code § 6621. 20 C.F.R. §§ 725.608(a) and 725.608(c).

PAYMENT IN ADDITION TO COMPENSATION: 20 C.F.R. § 725.530(a)(Applicable to claims adjudicated on or after Jan. 20, 2001) provides that "An operator that fails to pay any benefits that are due, with interest, shall be considered in default with respect to those benefits, and the provisions of § 725.605 of this part shall be applicable. In addition, a claimant who does not receive any benefits within **10 days** of the date they become due is entitled to additional compensation equal to **twenty percent** of those benefits (see § 725.607)."

NOTICE OF APPEAL RIGHTS (Effective Jan. 19, 2001): Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board before the decision becomes final, i.e., at the expiration of thirty (30) days after "filing" (or **receipt by**) with the Division of Coal Mine Workers' Compensation, OWCP, ESA, ("DCMWC"), by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601.**[75] At the time you file an appeal with the Board, you **must also send a copy** of the appeal letter **to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210**. *See* 20 C.F.R. § 725.481.

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).

[75] 20 C.F.R. § 725.479 (Change effective Jan. 19, 2001). (d) Regardless of any defect in service, **actual receipt** of the decision is suffice to commence the 30-day period for requesting reconsideration or appealing the decision.